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No. 00-878

# In the Supreme Court of the United States

RICHARD L. MATHIAS, ET AL., PETITIONERS,

*v.*

WORLDCOM TECHNOLOGIES, ET AL., RESPONDENTS.

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR RESPONDENT ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS

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## QUESTIONS PRESENTED

1. Whether a state commission's decision altering the terms of an interconnection agreement approved under section 252 of the Telecommunications Act of 1996 is a "determination under [section 252]" and thus reviewable in federal court under section 252(e)(6) of the Act.

2. Whether a state commission's voluntary acceptance of Congress's invitation under the 1996 Act to participate in implementing a federal regulatory program that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

3. Whether an action seeking prospective relief against state public utility commissioners in their official capacity for alleged ongoing violations of federal law in performing federal regulatory functions under the 1996 Act can be maintained under the *Ex parte Young* doctrine.

## LIST OF PARTIES TO THE PROCEEDING BELOW

AT&T Communications of Illinois, Inc.

Brent S. Bohlen, in his official capacity as a Commissioner of the Illinois Commerce Commission

Focal Communications Corporation

Terry Harvill, in his official capacity as a Commissioner of the Illinois Commerce Commission

Edward C. Hurley, in his official capacity as a Commissioner of the Illinois Commerce Commission

Illinois Bell Telephone Company d/b/a Ameritech Illinois

Richard Kolhauser, in his official capacity as a Commissioner of the Illinois Commerce Commission

Ruth Kretschmer, in her official capacity as a Commissioner of the Illinois Commerce Commission

Richard Mathias, in his official capacity as a Commissioner of the Illinois Commerce Commission

Karl McDermott, in his official capacity as a Commissioner of the Illinois Commerce Commission

MCIMetro Access Transmission Services, Inc.

MCI Telecommunications Corporation

Dan Miller, in his official capacity as a Commissioner of the Illinois Commerce Commission

Mary F. Squires, in her official capacity as a Commissioner of the Illinois Commerce Commission

Teleport Communications Group, Inc.

Worldcom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc.



## RULE 29.6 STATEMENT

Respondent Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications Inc.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-22a) is reported at 179 F.3d 566 (7th Cir. 1999). That opinion was amended by subsequent order (Pet. App. 3a-5a), which was not reported. The opinion of the district court (Pet. App. 23a-35a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on June 18, 1999, and amended on August 19, 1999. Petitions for panel rehearing and rehearing en banc were denied on August 9, 2000. Justice Stevens granted petitioners' application to extend the date for filing their petition for a writ of certiorari to November 28, 2000. The petition was granted on March 5, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). Jurisdiction was proper in the district court under 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1337.

## STATEMENT

This case will determine whether the federal courts have jurisdiction under section 252(e)(6) of the Telecommunications Act of 1996 to review claims that state commissions have violated the procedural and substantive requirements of the Act by imposing new obligations on local exchange carriers under the guise of "interpreting" interconnection agreements previously approved by those commissions. The case arises from an Illinois commission determination that Ameritech is required by its interconnection agreements to pay tens of millions of dollars in reciprocal compensation to competing local carriers on Internet traffic. The interconnection agreements themselves limit Ameritech's obligations to pay reciprocal compensation to the reciprocal compensation requirements of the Act, and the FCC has authoritatively determined that "ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5)." *ISP Remand Order*, FCC 01-131 ¶ 3 (Apr. 27, 2001); accord *id.* ¶¶ 23, 30. The Illinois Commerce

Commission nonetheless ruled that such payments are required under the Act and that Ameritech agreed to make them.

The question is whether federal courts have jurisdiction to review this decision. The Seventh Circuit held that although the federal district court had jurisdiction over this case under section 252(e)(6) of the Act — because the commission decision was one "under" the Act — the federal court could not review Ameritech's claim that the state commission unlawfully nullified the terms of its interconnection agreements, which the commission treated as raising an ordinary state law question of contractual interpretation. The effect of this holding is to strip federal courts of the power to review claims that state commissions have imposed obligations on local exchange carriers that are inconsistent with the binding terms of those agreements, contrary to the requirements of the Act. This raises serious dangers of inconsistent interpretations of the obligations of telephone service providers across the 50 states, and of allowing state commissions to pursue regulatory policies in direct contravention of federal policy, without federal review. We urge this Court to hold — consistent with the language and structure of the Telecommunications Act — that all state commission determinations "under" section 252 of the Act are reviewable in federal court to decide whether they are consistent with the congressional scheme.

**A. Federally Mandated Interconnection "Agreements" Under The Telecommunications Act Of 1996.** The 1996 Act establishes a "new *federal* regime" that "fundamentally restructures local telephone markets" and "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 379 n.6, 397 (1999) (emphasis in original). As Justice Scalia's opinion for the Court explained, "the question" under the Act "is not whether the Federal Government has taken the regulation of local telecommunications competition away



from the States. *With regard to the matters addressed by the 1996 Act, it unquestionably has.*" *Id.* at 379 n.6 (emphasis added).

The key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252. Those sections govern the formation and content of "interconnection agreements." Notwithstanding their nomenclature, interconnection "agreements" are nothing like private commercial contracts. Private parties are free to determine with whom and on what terms they will deal; if they are unable to reach agreement after arms-length negotiations, they can simply walk away from the bargaining table without an agreement. Under the Act, however, Congress has compelled incumbent local exchange carriers ("LECs") to enter into "agreements" that implement "a host of duties intended to facilitate market entry" by competing LECs. *AT&T Corp.*, 525 U.S. at 371. See generally 47 U.S.C. § 251(b)-(c).

If an incumbent LEC does not agree to include in its interconnection agreement what a competing carrier believes to be required by federal statute or regulation, that carrier has a right to ask a state commission (or the FCC, if the state commission fails to act) to compel the incumbent to include the disputed provision. Further, section 252(i) makes the terms and conditions in one interconnection agreement immediately available to any other requesting carrier, thereby setting an absolute floor for future agreements. In short, the Act sets forth a detailed framework for imposing a web of *federal* statutory and regulatory obligations on incumbent LECs. Section 252 interconnection "agreements" are not ordinary contracts but regulatory vehicles for implementing these Congressional commands.

Because the Act's default rules for local competition are explicitly set forth and easily invoked, incumbent LECs have

little incentive to give more, and competing LECs have little incentive to take less, than the Act requires. Accordingly, even "negotiated" terms in section 252 "agreements" often are incorporated without any give and take between the parties because federal law makes clear the rights of the competing LEC and the duties of the incumbent LEC. Although embodied in a "negotiated" agreement, the obligations are commonly framed in statutory terms and precisely track federal statutory requirements. See *AT&T Communications of Southern States, Inc.* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). The agreement "means" and "intends" nothing more nor less than to comply with the requirements of the Act. As explained below, the parties to the Agreements here said just that with respect to their federally mandated reciprocal compensation obligations.

**B. The Process For Entering Into, And Resolving Disputes Under, Section 252 Interconnection Agreements.** Section 252 of the Act prescribes the process through which competing LECs arrive at agreements with incumbent LECs for the performance of duties imposed by section 251. A competing LEC initiates the section 252 negotiation process by requesting interconnection with an incumbent LEC. 47 U.S.C. § 252(a). The incumbent then may "negotiate and *enter into a binding agreement* with the requesting telecommunications carrier or carriers," without regard to the substantive requirements of the Act. *Id.* § 252(a)(1) (emphasis added). However, as noted above, the competing carrier has no incentive to accept less, or the incumbent to give more, than the statute's default provisions prescribe.

If the parties fail to reach full agreement through negotiation alone, the Act permits them to petition the state commission "to arbitrate any open issues." 47 U.S.C. § 252(b)(1). In conducting section 252 arbitrations, state regulators resolve open issues by "imposing appropriate conditions as required to implement [section 252(c)],"



provided that those conditions "meet the requirements of section 251" and the FCC's rules implementing it. *Id.* §§ 252(b)(4)(C), 252(c)(1); see also *AT&T Corp.*, 525 U.S. at 373 (noting that section 252 arbitrations are "subject to § 251 and the FCC regulations promulgated thereunder").

After all issues have been resolved, through negotiation, arbitration, or both, the parties submit the agreement to the state commission for approval. 47 U.S.C. § 252(e). The state commission must then "approve or reject the agreement" (*id.* § 252(e)(1)) in accordance with standards mandated by the Act. See *id.* §§ 252(e)(1), (2). Commission-approved agreements become "binding" regulatory mandates with which the parties must comply and which the commission has no authority to alter. *Id.* § 252(a)(1). Further, because the terms of approved agreements become immediately available to all other requesting competitors who elect to adopt them (*id.* § 252(i)), the obligations in approved interconnection agreements not only define the parties' duties to each other but may also determine the incumbent's duties toward other carriers.

The FCC and most state commissions have understood the Act to authorize state commissions to interpret and enforce agreements they have approved under section 252. The FCC has held that any "dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" lies within "the states' 'responsibility' under section 252" of the Act. *In re Starpower Communications, LLC*, 15 F.C.C.R. 11277, ¶ 6 (2000) ("*Starpower*"). As the FCC has observed, "[s]tate commission determinations that interpret and give effect to interconnection agreements *are often the principal mechanism for establishing the substance of the parties' obligations under the 1996 Act.*" Brief for the United States and the FCC as Intervenors at 19, *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.* (8th Cir. filed Mar. 22, 2000) (No. 99-3952) (emphasis

added). Section 252(e)(5) requires the FCC to discharge any "responsibility under this section in any proceeding or other matter under this section" that a state commission is authorized to undertake but declines to perform, subject to federal court review under the Hobbs Act (47 U.S.C. § 252(e)(6)).

**C. Federal Judicial Review.** Section 252(e)(6), entitled "Review of State commission actions," states in broad and generic language that "[i]n *any case* in which a State commission makes a *determination under this section*, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [sections 251 and 252]." 47 U.S.C. § 252(e)(6) (emphasis added).[1] The statute does not contemplate any state commission action taken under section 252 of the Act that is not subject to federal court review.

**D. The Dispute Over Payment Of Reciprocal Compensation On Internet Traffic.**

**1. Reciprocal compensation under the 1996 Act.** The underlying dispute in this case involves the statutory "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications" imposed on local exchange carriers under section 251(b)(5) of the Act. Section 252(d)(2) of the Act requires that reciprocal compensation arrangements under section 251(b)(5) "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Construing these statutory

[1] "The term 'State commission' means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 153(41).



provisions, the FCC has held that Internet traffic "is not subject to the reciprocal compensation provisions of section 251(b)(5)." *ISP Remand Order* ¶ 35; accord *id.* ¶¶ 3, 23, 30.[2]

**2. Reciprocal compensation under the parties' agreements.** As required by the Act (47 U.S.C. §§ 251(b)(5), 252(d)(2)), Ameritech entered into interconnection agreements that establish reciprocal compensation arrangements between the parties. The reciprocal compensation provision in each Agreement appears under a heading that cites the reciprocal compensation provision set forth in the Act: "Reciprocal Compensation Arrangements — Section 251(b)(5)." J.A. 9a, 14a, 20a, 25a, 33a. And the Agreements specifically provide that the parties' reciprocal compensation obligations are "As Described in the Act" (J.A. 8a, 14a, 20a, 30a, 38a), which is in turn defined in each agreement to mean "as described in or required by the Act" (J.A. 8a, 13a, 19a, 30a, 37a).

[2] The FCC found that the assessment of reciprocal compensation on Internet traffic represented a "classic regulatory arbitrage" (*ISP Remand Order* ¶ 21) that created a "windfall" for new entrants receiving such payments (*id.* ¶ 70). While reciprocal compensation was founded on the assumption "that traffic back and forth on these interconnected networks would be relatively balanced," in reality "ISP modems do not generally call anyone in the exchange." *Id.* ¶ 21. Thus, "traffic to ISPs flows one way," and "so does money in a reciprocal compensation regime." *Ibid.* The FCC explained that such "large one-way flows of cash" have "distort[ed] the development of competitive markets" (*ibid.*) and encouraged carriers to compete by shifting their costs to incumbent carriers — even where the competitor is using the incumbent's own facilities — rather than on the basis of quality or efficiency. Such a subsidy, the agency noted, "cannot be sustained * * * in the competitive markets for telecommunications services envisioned by the 1996 Act." *Id.* ¶ 4.

**E. The Proceedings Below.**

**1. The ICC order.** In 1997, several competing LECs filed complaints against Ameritech before the Illinois Commerce Commission ("ICC"), alleging that Ameritech had violated its section 252 interconnection agreements by failing to pay reciprocal compensation on Internet traffic routed through Internet Service Providers ("ISPs"). Numerous similar disputes arose nationwide. The amounts at stake in this case alone measure in the tens, if not hundreds, of millions of dollars.

The question before the ICC was whether the competing LECs were entitled under their Agreements with Ameritech to receive reciprocal compensation on Internet traffic. As noted above, the Agreements expressly provide that the parties' reciprocal compensation arrangements are "As Described in the Act," which is in turn defined to mean "as described in or required by the Act." Nonetheless, the ICC Commissioners, explicitly invoking "jurisdiction under the [Illinois] Public Utilities Act and Section 252 of the Telecommunications Act of 1996 * * * to interpret and enforce the terms of interconnection agreements" (J.A. 112a), agreed with the competing LECs and held that "by discontinuing its reciprocal compensation payments" on Internet traffic, Ameritech violated "its interconnection agreements, and its duty under the Act." *Id.* at 114a.

**2. The District Court decision.** Ameritech brought an action in federal district court against the Commissioners in their official capacities under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331, seeking review of the Commissioners' Order. The Commissioners moved to dismiss for lack of jurisdiction and on Eleventh Amendment immunity grounds. The district court denied the motion, finding jurisdiction under section 252(e)(6) (Pet. App. 26a-29a & n.3), and holding that the Commissioners (i) waived the state's Eleventh Amendment



immunity by participating voluntarily in the federal regulatory scheme under the Act and, in the alternative, (ii) were subject to suit in their official capacities under the *Ex parte Young* doctrine. *Id.* at 30a. But the court upheld the Commissioners' determination on the merits, characterizing the issue as "whether LECs are entitled to reciprocal compensation pursuant to section 251(b) of the Telecommunications Act" for Internet-bound traffic, and holding that the ICC did not err in determining that the agreements and section 251(b)(5) do, in fact, require reciprocal compensation on such traffic. J.A. 166a-167a.

**3. The Seventh Circuit decision.** On appeal, Ameritech argued that (i) "the Act does not require reciprocal compensation" on Internet traffic, (ii) "the agreements precisely track the Act (reciprocal compensation is 'as described in the Act')," and (iii) "therefore the agreements cannot require reciprocal compensation for calls to ISPs." Pet. App. 19a. Ameritech did not argue that the Act *prohibited* Ameritech from agreeing to pay reciprocal compensation on Internet calls. Rather, Ameritech argued that (i) the Act did not *require* payment of reciprocal compensation on Internet calls, and (ii) Ameritech did not agree to pay reciprocal compensation on Internet calls, but instead entered into a binding section 252 agreement that *limited* Ameritech's reciprocal compensation obligations to compensation required by the Act.

The court of appeals rejected the Commissioners' Eleventh Amendment immunity argument as "no longer tenable" (Pet. App. 12a) in light of binding circuit precedent established in *MCI Telecommunications Corp.* v. *Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir.), amended, 183 F.3d 558 (7th Cir.), vacated, 183 F.3d 567 (7th Cir. 1999), opinion after reh'g, 222 F.3d 323 (7th Cir. 2000), cert. denied,

121 S. Ct. 896 (2001).[3] Then, despite the court's recognition that "[d]ecisions of state agencies implementing the 1996 Act are reviewable in federal district courts" (*Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 157 F.3d 500, 501 (7th Cir. 1998)), the court determined that it had no jurisdiction to decide Ameritech's principal claim on appeal. Pet. App. 4a-5a.

The Seventh Circuit refused to decide whether the Commissioners erred in holding that Ameritech's section 252 agreements required the payment of reciprocal compensation on Internet calls. Pet. App. 4a-5a. In the court's view, a claim that the Commissioners "'interpret[ed]' an agreement contrary to its terms creates a different kind of problem — one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Ibid.* Thus, the court refused to adjudicate Ameritech's claim that the Commissioners failed to enforce the provisions of the section 252 agreements that expressly limited Ameritech's reciprocal compensation obligations to those "described in or required by the Act." Instead, the court determined only that, assuming that the Commissioners correctly interpreted the agreements, federal law would not prohibit such agreements. *Id.* at 17a-18a.

As the panel recognized, its construction of the Act creates a bifurcated "allocation of authority," pursuant to which review of state commission determinations concerning section

[3] On rehearing in that case, the Seventh Circuit held that "the Eleventh Amendment does not bar these suits against the state commissions and their commissioners" for two independent reasons. *MCI II*, 222 F.3d at 328. First, the court held that "in the particular circumstances present in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act." *Ibid.* Second, the court held that "the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine." *Ibid.*



252 agreements would be divided between federal and state courts. Pet. App. 4a-5a. The panel acknowledged that "[t]his allocation of authority has a potential to cause problems," and "may not have much to recommend it," because "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer 'no.'" Pet. App. 5a. Under the panel's decision, therefore, Ameritech's claim that the ICC failed to enforce express limitations on the scope of Ameritech's obligation to pay reciprocal compensation under its federally mandated interconnection agreements presents a question reviewable only in state court — even though (i) the Act specifically provides (47 U.S.C. § 252(a)) that the terms of such agreements are "binding" as a matter of federal law, (ii) the obligation to pay reciprocal compensation is mandated by section 251(b)(5) of the Act, and (iii) Ameritech's *claim* in this case is that its section 252 agreements expressly limit the payment of reciprocal compensation to instances where such payment is "required by the Act."

## SUMMARY OF ARGUMENT

I. The initial question presented in this case is whether the federal courts have jurisdiction to review Ameritech's claim that a state commission has nullified vital provisions in binding interconnection agreements that implement national telecommunications policy under the 1996 Act. Federal jurisdiction exists under both 28 U.S.C. § 1331 (see Brief for Petitioners in No. 00-1531) and section 252(e)(6) of the Act.

Section 252(e)(6) provides in broad and inclusive terms that "[i]n *any case* in which a State commission makes a *determination under this section*, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement * * * *meets*

*the requirements of section 251 of this title and this section.*" (Emphasis added.) The FCC and numerous state commissions — including petitioners themselves in the Order giving rise to this case — have held that a state commission decision resolving the precise claim raised by Ameritech constitutes a "determination under [section 252]." Ameritech's claim that petitioners violated the Act by abrogating binding terms of its Agreements squarely raises the question whether the Agreements, as modified by petitioners, "meet[] the requirements of" the Act. Ameritech's claim thus fully satisfies the textual prerequisites for section 252(e)(6) jurisdiction.

The structure and purpose of the Act confirm federal court jurisdiction over Ameritech's claim. In section 252 Congress made clear its intent that regulatory determinations defining the rights and obligations in interconnection agreements conform to the procedural and substantive standards of the Act. Section 252(e)(6) provides the mechanism for ensuring that federal courts have authority to "draw the lines to which [state officials] must hew" and "bring * * * to heel" state officials who are "not regulating in accordance with federal policy." *AT&T Corp.*, 525 U.S. at 379 n.6. Whether a state commission imposes obligations on private carriers in the context of (i) arbitrating a disputed term before initial approval of an agreement or (ii) interpreting a disputed term in a previously approved agreement, the effect of its decision is the same. The federal interests in uniformity and consistency with federal law also are the same. Petitioners' argument that the former category of cases should be resolved in federal court and the latter category in state court would substantially undermine the statutory scheme and impose adverse consequences that Congress could not have intended.

II. The second question before the Court is whether petitioners' voluntary performance of federal regulatory functions under the Act constitutes a waiver of the state's



Eleventh Amendment immunity. It is well established that Congress may solicit the states' voluntary consent to private suits in federal court. The Act does precisely that. It invites state commissions to participate as "deputized federal regulator[s]" (*MCI II*, 222 F.3d at 344), subject to federal court review under section 252(e)(6). At the same time, however, sections 252(e)(5) and (e)(6) establish a parallel regulatory scheme in which the FCC performs those federal regulatory duties that a state declines to perform, again subject to federal review.

Petitioners voluntarily accepted Congress's offer to participate in this regulatory program. They recited specifically that they were proceeding under section 252 of the Act, a provision that expressly mandates federal court review. Nevertheless, petitioners now claim that their actions did not amount to a waiver of Eleventh Amendment immunity. Petitioners contend that Congress did not provide sufficient notice that federal court review was a condition of state participation. But section 252(e)(6) of the Act could hardly be clearer with respect to the consequences of making a "determination" defining obligations in section 252 agreements.

Petitioners also claim that they were unconstitutionally coerced by Congress into regulating under the Act. That argument cannot be squared with this Court's precedents, holding that Congress is free to condition a grant of authority that a state would not otherwise possess on the state's consent to suit in federal court. Petitioners do not dispute that Congress could have given the FCC all regulatory responsibilities under the 1996 Act, instead of giving the states the opportunity to perform those responsibilities if they so desired. Because Congress created the regulatory regime established by the 1996 Act, it had the power to offer or withhold authority to act as a regulator in the implementation of the new federal statute. For that reason, petitioners'

premise that their actions constitute "otherwise permissible activity" is mistaken. Under the Act, petitioners may unquestionably choose not to participate (as the Virginia commission repeatedly has done). However, if they elect to participate, they must do so according to Congress's rules.

III. The third question is whether petitioners are proper parties to this lawsuit under the *Ex parte Young* doctrine. As this Court consistently has held, that doctrine is essential to ensure that state officials do not use the Eleventh Amendment to avoid compliance with federal law. To determine whether an official capacity suit against a state officer may proceed, this Court has established a "straightforward inquiry" into whether the complaint alleges an ongoing violation of federal law and seeks prospective declaratory or injunctive relief.

Although they concede the continued vitality of *Ex parte Young*, petitioners contend that the doctrine does not apply in this case for two reasons. First, relying on *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), petitioners claim that their "discretionary" acts cannot violate federal law. However, this Court's decisions consistently hold that state officers have no "discretion" to violate federal law and can be enjoined if they do so. Second, relying on *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), petitioners assert that the remedies available under *Ex parte Young* are inconsistent with the Act's remedial scheme. Petitioners' argument turns *Seminole Tribe* on its head. In that case the Court refused to apply *Ex parte Young* because Congress had imposed severe restrictions on the remedies that the federal courts would otherwise have had at their disposal (including *Ex parte Young* relief). Here, Congress has imposed no such limitations. Congress has provided for federal court review to ensure the very compliance with federal law that *Ex parte Young* traditionally has guaranteed.



## ARGUMENT

### I. THE FEDERAL COURTS HAVE JURISDICTION OVER AMERITECH'S CLAIMS UNDER 47 U.S.C. § 252(e)(6).

**A. The governing statutory language encompasses Ameritech's claim.** Ameritech's claim in this case is straightforward: (i) its interconnection agreements expressly limit Ameritech's reciprocal compensation obligations to the requirements of section 251(b)(5) of the 1996 Act, (ii) section 251(b)(5) does not require reciprocal compensation on Internet traffic, and, therefore, (iii) petitioners' Order imposing an obligation to pay reciprocal compensation on Internet traffic violates section 252(a)(1) of the Act, which makes an approved interconnection agreement the "binding" statement of the parties' interconnection rights and obligations. The threshold question before this Court is whether the federal courts have jurisdiction over that claim.

For the reasons stated in petitioners' brief in the companion case, *Verizon North, Inc.* v. *Public Serv. Comm'n of Maryland*, Nos. 00-1531 & 00-1711 (consolidated), the federal courts clearly have general federal question jurisdiction over Ameritech's claim in this case (and Verizon's parallel claim) pursuant to 28 U.S.C. § 1331.[4] In addition, section 252(e)(6) of the Act expressly provides federal courts with jurisdiction to review state commission decisions defining obligations prescribed in interconnection agreements mandated by the 1996 Act. That provision confers federal subject matter jurisdiction here.

Section 252(e)(6), entitled "Review of State commission actions," provides that "[i]n *any case* in which a State

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[4] Ameritech's complaint alleged jurisdiction under section 252(e)(6) and section 1331 (J.A. 126a, 127a), and Ameritech preserved this argument in the district court and in the court of appeals.

commission makes a *determination under this section*, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement *meets the requirements of* section 251 of this title and this section." 47 U.S.C. § 252(e)(6) (emphasis added). In permitting federal judicial review in "any case" involving a "determination under this section," Congress plainly intended federal courts to review any "state commission actions" taken pursuant to section 252. The broad and inclusive language of section 252(e)(6) easily encompasses Ameritech's claim in this case. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (statutory construction must begin "with the language of the statute itself").

***"Determination under this section."*** As petitioners note (at 18), this Court considered the meaning of the phraseology pertinent here in *Ardestani* v. *INS*, 502 U.S. 129 (1991). In that case, the Court looked to the "most natural reading" of the statutory language and determined that the term "under" means "'subject to' or 'governed by'" or "'by reason of the authority of.'" *Id.* at 135. Applying those definitions to the statutory language at issue in this case, any state or federal regulatory determination that particularizes or gives legal effect to obligations in a federal interconnection agreement mandated by section 252 of the Act is a "determination under section 252."

In its role as primary administrator and enforcer of the 1996 Act, the FCC has construed the relevant statutory text to confirm that a dispute such as this one falls squarely within the responsibilities of the state commission "under section 252." *In re Starpower Communications, LLC*, 15 F.C.C.R. 11277 (2000). In *Starpower*, as here, a competing LEC initiated a complaint proceeding before a state commission "with respect to a dispute concerning the interpretation and enforcement of its interconnection agreements." *Id.* ¶ 1. The



competing LEC claimed that the incumbent LECs owed reciprocal compensation on Internet traffic under their section 252 interconnection agreements. *Id.* ¶ 3. The state commission refused to resolve this dispute (*id.* ¶ 4) and the competing LEC requested the FCC to do so.

Because the FCC only has jurisdiction under section 252(e)(5) if the state commission would have had jurisdiction under section 252, the FCC first had to determine whether "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" lies within "the states' 'responsibility' under section 252." *Starpower*, ¶ 6. The FCC held squarely that it did. It then concluded that the state commission's refusal to resolve the interpretation dispute before it concerning "inter-carrier compensation for ISP-bound traffic" constituted a "failure to act" within the meaning of section 252(e)(5). *Id.* ¶ 7. Accordingly, the FCC held that it would "proceed to resolve only the question that the Virginia Commission would have resolved had it chosen to act: *whether the existing interconnection agreements between Starpower and GTE and Bell Atlantic require GTE and Bell Atlantic to pay compensation to Starpower for the delivery of ISP-bound traffic.*" *Id.* ¶ 9 (emphasis added). Thus, in a ruling entitled to deference here, the FCC has confirmed that the precise state commission "determination" at issue in this case is one made "under section 252."

Moreover, numerous state commissions have acknowledged that they act "under section 252" in resolving disputes concerning the obligation to pay reciprocal compensation on Internet traffic pursuant to section 252 agreements.[5] Indeed, petitioners' own contemporaneous

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[5] See, *e.g.*, *In re Emergency Petitions of ICG Telecom Group*, No. 26619, slip op. at 5 (Ala. PSC Mar. 4, 1999); *Connect Communications Corp.* v. *Southwestern Bell Tel. Co.*, No. 98-167-C,

opinion acknowledged that they acted "under" section 252 when they defined and enforced the terms of Ameritech's federal Agreements. In the March 1998 Order that gave rise to Ameritech's section 252(e)(6) lawsuit, petitioners unequivocally stated that "[t]his Commission's jurisdiction *under* the Public Utilities Act and *Section 252 of the Telecommunications Act of 1996* * * * to interpret and enforce the terms of interconnection agreements is not disputed." J.A. 112a (emphasis added).[6] Because section 252 is the sole

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1998 WL 974059, at *4-*5 (Ark. PSC Dec. 31, 1998); *Intermedia Communications* v. *BellSouth, Inc.*, No. 991534-TP, 2000 WL 1532553, at *2, *10 (Fla. PSC Sept. 14, 2000); *In re Complaint of e.spire Communications, Inc.*, No. 9281-U, slip op. at 3 (Ga. PSC Feb. 16, 1999); *In re Complaint of Time Warner Communications*, No. 41097, slip op. at 2 (Ind. URC Feb. 3, 1999); *In re WorldCom Technologies*, Decision T.E. 97-116, 1998 WL 941813 (Mass. DTE Oct. 26, 1998); *In re Application for Approval of an Interconnection Agreement*, Nos. U-11178, et al., slip op. at 14 (Mich. PSC Jan. 28, 1998); *In re Complaint of MCImetro Access Transmission Services*, No. 97-1723-TP-CSS, slip op. at 6 (Ohio PUC Oct. 14, 1998); *In re Application of Brooks Fiber Communications*, No. PUD 970000548, slip op. at 6 (Okla. Corp. Comm'n June 3, 1998); *Electric Lightwave, Inc.* v. *U S West*, No. UC 377, Order No. 99-285, slip op. at 3 (Or. PUC Apr. 26, 1999); *Petition for Declaratory Order of TCG Delaware Valley*, No. P-00971256, slip op. at 20 (Pa. PUC June 16, 1998); *In re NEVD*, No. 2935, Order No. 15915, 1999 WL 987057, at *4 (R.I. PUC July 21, 1999); *In re Petition of Brooks Fiber*, No. 98-00118, slip op. at 12 (Tenn. Reg. Auth. Apr. 21, 1998); *Complaint of MCImetro Access Transmission Services*, No. 6720-TD-102, slip op. at 5 (Wis. PSC Jan. 18, 2000).

[6] In so ruling, petitioners cited the Eighth Circuit's decision in *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and rev'd in part, 525 U.S. 366 (1999). That decision held that "the state commissions' plenary authority to accept or reject" interconnection agreements under section 252(e)(1) of the Act "carries with it the authority to enforce the provisions of the agreements that the state commissions have approved." *Id.* at 804. Thus, the decision on which



source of petitioners' authority to exercise regulatory power over federal interconnection agreements, their decisions purporting to "interpret" or "enforce" the terms of such agreements necessarily constitute determinations under section 252 that are reviewable in federal court under section 252(e)(6).[7]

As Verizon has demonstrated in its brief in the companion case, interconnection agreements are tantamount to federal tariffs. See Brief for Petitioner in No. 00-1531, § I.B.2. Like tariffs, section 252 interconnection agreements are federal regulatory vehicles required by law, their terms are made binding by law, and they apply generally to all similarly situated carriers requesting services from a public utility. Under this Court's decisions, any "question of tariff construction" arising after initial filing or approval falls "within the exclusive primary jurisdiction" of the ICC by

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petitioners' own jurisdictional analysis rested concluded that (i) section 252 authorized state commission jurisdiction over disputes that arise after the initial agreement approval, and (ii) state commission decisions enforcing the terms of previously approved section 252 agreements are "determinations under section 252" that are subject to federal court review under section 252(e)(6). See *id.* at 804 n.24.

[7] Petitioners' post hoc argument in this Court is also flatly contradicted by the categorical statement — in a brief filed in the D.C. Circuit in the appeal of the *ISP Remand Order* signed by amicus National Association of Regulatory Utility Commissioners (whose members include petitioners) — that "[o]nce the State commission approves an interconnection agreement, *it is charged with interpreting and enforcing the agreement, but the State commission determinations are subject to review in federal court for consistency with the Act.*" Brief for State Commission Petitioners and Supporting Intervenor at 3-4, *WorldCom, Inc., et al.* v. *FCC* (D.C. Cir. filed Aug. 28, 2001) (Nos. 01-1218, et al.) (emphasis added) (citing 47 U.S.C. § 252(e)(6)).

virtue of the delegation of authority in section 252. *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63 (1956).

***"Meets the requirements of" sections 251 and 252.*** Ameritech's claim also satisfies the second textual prerequisite for federal jurisdiction under section 252(e)(6). In providing federal court review "to determine whether the agreement * * * meets the requirements of" sections 251 *and* 252, Congress made clear that allegations that an agreement does not comply with the requirements of the Act are matters of federal concern. Ameritech claims that petitioners violated the section 252(a)(1) requirement that approved interconnection agreements be enforced as "binding" statements of the parties' rights and duties by nullifying express limitations on Ameritech's reciprocal compensation obligations. That claim directly raises the question whether the Agreements, as interpreted, "meet[] the requirements of" the Act. To resolve the merits of Ameritech's claim, a court must determine whether the state commission imposed new obligations (as Ameritech alleges) or simply enforced the terms to which the parties agreed (as the ICC erroneously concluded). But for purposes of federal jurisdiction, Ameritech's allegations are controlling. *Bell* v. *Hood*, 327 U.S. 678, 685 (1946).[8]

Notwithstanding the broad language of section 252(e)(6) and the unequivocal declaration in their March 1998 Order, petitioners now argue that section 252(e)(6) does not provide federal jurisdiction. Pet. Br. 16-20. According to petitioners, jurisdiction under that section is limited to state commission

[8] See 11 Richard A. Lord, *Williston on Contracts* § 31:5 (4th ed. 1999) ("[T]he interpretation or construction of a contract does not include its modification or the creation of a new or different agreement; a court is not at liberty to revise, modify, or distort an agreement while professing to construe it, and has no right to make a different contract from that actually made by the parties").



determinations concerning the "approval" of interconnection agreements.

This argument is doubly flawed. To begin with, the language of section 252(e)(6) makes no reference whatsoever to state commission "approval" of an interconnection agreement. As explained above, the operative terms in that provision are "determination under this section" and "meets the requirements of" federal law. There is no basis for inferring from the generic language chosen by Congress any intent to adopt petitioners' artificial limitation on federal jurisdiction. See, *e.g.*, *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 243-248 (1989) (rejecting proposed narrowing construction of general statutory terms); *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 472 (1982) (declining to "engraft artificial limitations" on broad statutory language).

Beyond this, even if one were to import the notion of "approval" into section 252(e)(6), Ameritech's claim would fit comfortably within the scope of that provision. Ameritech contends that petitioners' determination that Ameritech must pay reciprocal compensation when compensation is *not* required by the Act effectively nullified express limitations in the parties' negotiated Agreements. Petitioners' action resulted in the formation and approval of *new* interconnection obligations.

**B. The structure and purpose of the Act confirm federal jurisdiction here.** Contrary to petitioners' contention (Pet. Br. 20), this Court has consistently stressed that "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). Statutory construction is "a holistic endeavor" (*United States* v. *Cleveland Indians Baseball Co.*, 121 S. Ct. 1433, 1443 (2001)), and courts accordingly must "interpret the statute 'as

a symmetrical and coherent regulatory scheme,'" and "'fit, if possible, all parts into an harmonious whole.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). These canons of interpretation confirm the existence of federal jurisdiction here.

1. ***The design of the statute as a whole.*** As this Court has noted, the Act's division of authority between state and federal bodies is unusual. See *AT&T Corp.*, 525 U.S. at 379 n.6 ("a federal program administered by 50 independent state agencies is surpassing strange"). In deciding to allow state regulators to perform a central role in implementing federal policy, Congress used the mechanism of federal court review to ensure that the state agencies comply with federal law. State regulators are not "allowed to do their own thing." *Ibid.* They must adhere to the federal rules of the game. Section 252(e)(6) serves the critical function of empowering federal courts to "draw the lines to which [state officials] must hew" and to "bring * * * to heel" state officials who are "not regulating in accordance with federal policy." *Ibid.* This consideration applies to *all* state commission determinations under section 252 — not just to initial "approvals."

State commission decisions to approve or reject interconnection agreements are indisputably subject to federal court review. Federal review is not less important when state commissions exercise federal authority to interpret and enforce obligations carriers have assumed under the Act. This case provides a textbook example. When the Agreements in question were negotiated, Internet use was in its infancy, and the parties did not specifically address how Internet traffic would be treated for reciprocal compensation purposes. If they had done so and the present dispute had arisen at that time, the matter would have been resolved by arbitration, and either party could have taken the dispute to federal court for an authoritative ruling. Instead, however, the parties negotiated and the Commission approved agreements



providing that reciprocal compensation would be made only "as required" by the Act. When the dispute arose over the applicability of reciprocal compensation to Internet traffic, the matter was taken to the state commission, which assumed jurisdiction "under Section 252." At this juncture, the question is the same, the federal interest is the same, and the private interests are the same, as they would have been in the context of an initial approval. Federal review serves the same purpose of ensuring conformity of state commission decisions to federal policy.

In sum, decisions determining the substance of a carrier's obligations in the context of "interpretation and enforcement" of an agreement are functionally identical — in terms of the federal interest — to decisions determining the substance of a carrier's obligation in the context of "approval" of an agreement. The only difference is one of timing. It would have made no sense for Congress to have excluded such a large and important class of cases — involving state commission determinations issued under the authority of *federal* law to implement *federal* law obligations under *federally* mandated agreements — from the Act's judicial review scheme. Nowhere in the statute did Congress authorize state commissions to implement federal policy without federal review. There is no reason to bypass federal review here.

2. ***The goal of federal uniformity.*** Petitioners' proposed construction would also frustrate Congress's manifest design to ensure *uniform* implementation of the 1996 Act. Congress provided for federal judicial review to safeguard the integrity of the regulatory vehicle that it created to implement the national telecommunications policies established by the Act — the section 252 interconnection agreement. That objective is accomplished through federal judicial review of all state commission determinations affecting interconnection obligations for compliance with federal law. Petitioners' reading of section 252 arbitrarily excludes a substantial category of

regulatory determinations from federal judicial review. Such a reading "produces a most chopped-up statute" (*AT&T Corp.*, 525 U.S. at 382 n.8) that frustrates the goal of uniformity. Ameritech's interpretation of the Act's judicial review provisions, by contrast, achieves Congress's purposes by treating the Act "'as a symmetrical and coherent regulatory scheme.'" *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

Despite their recognition that Congress wanted "assurance that [interconnection] agreements meet the requirements of federal and state law" (Pet. Br. 24), petitioners insist that federal judicial review of state commission decisions should occur only at the time the agreement is approved. The flaw in petitioners' argument is their assumption that a state commission's initial approval is an endpoint in the formation of interconnection rights and obligations. Petitioners themselves concede that "interpretation cases will likely represent the great bulk of litigation regarding interconnection agreements, as an agreement need only be approved once but may be interpreted in any number of subsequent disagreements between parties." Pet. Br. 24. This is an understatement. As the FCC has observed, "[s]tate commission determinations that interpret and give effect to interconnection agreements are often the principal mechanism for establishing the substance of the parties' obligations under the 1996 Act." Brief for the United States and the FCC as Intervenors at 19, *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.* (8th Cir. filed Mar. 22, 2000) (No. 99-3952). It would pervert Congress's regulatory scheme to conclude that such determinations — which are, in substance, binding arbitrations of disputed terms in the agreements — are not reviewable in federal court under section 252(e)(6).

Contrary to petitioners' suggestion that Congress was concerned solely with the formalities of agreement formation — and was content to leave to the state courts review of



subsequent state commission determinations giving "substance" to those agreements — section 252 evinces Congress's intent to ensure that commission action defining rights and obligations prescribed in a section 252 agreement comports with federal law. Time and again, Congress declared that regulators and courts should ensure that interconnection terms imposed outside the negotiation process meet the requirements of federal law. For example, in section 252(c), entitled "Standards for arbitration," Congress provided, *inter alia*, that "[i]n resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall — (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title; [and] (2) establish any rates for interconnection, services, or network elements according to subsection (d) [of section 252]." 47 U.S.C. § 252(c). Similarly, Congress stated that a "State commission may only reject" portions of an agreement adopted by arbitration "if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section." *Id.* § 252(e)(2)(B).

These provisions reflect Congress's paramount concern that state commission decisions affecting the obligations in a section 252 interconnection agreement comply with federal law. And Congress maintained its focus on compliance with federal law in prescribing the scope of federal court jurisdiction under section 252(e)(6). Congress directed federal courts reviewing "State commission actions" — and, in particular, state commission "determinations under this section" — to "determine whether the agreement or statement meets the requirements of section 251 of this title and this

section." *Id.* § 252(e)(6). That provision reflects the perfect correspondence between state commission power to make regulatory "determination[s] under this section" and federal judicial review of such determinations for compliance with federal procedural and substantive law. There is no indication in the Act that Congress intended any deviation from this pervasive pattern of federal court review for the large class of "interpretation" and "enforcement" cases.

Petitioners' proposed bifurcation raises the specter of state agency determinations that nullify the effectiveness of federal judicial review of initial approval decisions and the development of divergent bodies of law in federal and state courts. Once a federal court has placed its imprimatur on a section 252 agreement as "meet[ing] the requirements of" federal law, a state commission should not be permitted, under the guise of "interpretation" or "enforcement," to alter the terms of such an agreement in a way that violates federal law. If petitioners were correct in asserting that a state commission may do that without federal judicial review, a state commission easily could evade Congress's intent to give federal courts the final word on whether state regulatory determinations under section 252 meet the requirements of the Act. The jurisdictional grant to review approval decisions to determine whether an agreement "meets the requirements of" the Act would be entirely ineffectual without continuing federal jurisdiction over subsequent state commission interpretations of the same agreement that allegedly violate the Act.

As one court of appeals has pertinently noted, Congress "could not have intended" such an arbitrary, time-based limitation on judicial review, because "certain state commission decisions would escape federal review simply because the dispute arose after the agreement had been approved." *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications*, 235 F.3d 493, 497 (10th Cir. 2000). It is



"most unlikely that Congress created such a strange hodgepodge." *AT&T Corp.*, 525 U.S. at 382 n.8; see also *Sheridan* v. *United States*, 487 U.S. 392, 402-403 n.7 (1988) (courts should strive to avoid such interpretations, "particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading"); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible").

**3.** ***The federal nature of interconnection agreements.*** There is no merit to petitioners' suggestion (Br. 24-26) that disputes over whether a state commission has nullified the terms of a binding section 252 interconnection agreement raise only issues of state contract law. As noted above, section 252 agreements are not ordinary private contracts; they are federal regulatory instruments that require incumbent carriers to cooperate with their competitors and share facilities in ways that are dictated by the requirements of the 1996 Act and the FCC's implementing regulations.

It is an understatement to say that, in "negotiating" the terms of "agreements," the parties bargain in the shadow of federal law. The Act imposes "a host of duties" on incumbent LECs (*AT&T Corp.*, 525 U.S. at 371) and correspondingly confers on competing LECs substantive federal rights to obtain access to private property at cost-based rates. If an incumbent LEC does not "agree" to accept what a competing carrier believes to be statutory or regulatory requirements, that carrier has a right to ask a state commission or the FCC to compel the incumbent to include those purported requirements in the "agreement."

An approved agreement thus is a carrier-specific federal regulation that implements federal law and policy. "[M]any so-called 'negotiated' provisions represent nothing more than

an attempt to comply with the requirements of the 1996 Act." *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). In fact, carriers may adopt terms that simply incorporate the requirements of the Act and its implementing regulations — in which case a dispute over the obligations imposed under the agreement is essentially a dispute over the meaning of the Act.

Not surprisingly, in serving as deputized federal regulators that interpret and enforce federal interconnection agreements, state commissioners are regularly called upon to make determinations on important issues of federal law. Here, for example, not only did the parties draft critical provisions of their Agreements (including those at issue in this dispute) to track the requirements of federal law, but petitioners overtly ruled on the scope of federal law in reaching their decision. J.A. 114a-116a. And that ruling — that federal law requires the payment of reciprocal compensation on Internet traffic — is at odds with the FCC's recognition that Internet traffic is "not subject to the reciprocal compensation requirement in section 251(b)." *ISP Remand Order* ¶ 23.

Moreover, section 252(i) makes the terms and conditions of any interconnection agreement immediately available to any other requesting carrier, just like the terms and conditions of a federally-approved tariff. That section severely restricts an incumbent LEC's ability to engage in ordinary "give-and-take," because "every concession * * * made (in exchange for some other benefit) * * * will automatically become available to every potential entrant." *AT&T Corp.*, 525 U.S. at 395. As a consequence of section 252(i), any regulatory determination by a state commission that abrogates the terms of a section 252 "agreement" or deviates from federal law has industry-wide effect. The notion that such a determination simply gives rise to a state law contract action is untenable.



**C. The Seventh Circuit erroneously concluded that it lacked jurisdiction over Ameritech's core claim.** The Seventh Circuit agreed with Ameritech that Congress conferred federal jurisdiction over state commission determinations made after the initial agreement approval. Pet. App. 13a-14a. Yet, as Ameritech has demonstrated in its cross-petition in this case (No. 00-921), the Seventh Circuit contradicted its own reading of the Act by concluding that it lacked jurisdiction over Ameritech's core claim.

The source of the Seventh Circuit's error was its view that, in reviewing a state commission determination, a federal court must *assume* that the commission respected the terms of the parties' interconnection agreement. Like petitioners, the Seventh Circuit believed that the question whether a state commission deviated from the terms of a binding section 252 agreement presents a problem "under the law of contracts, and therefore one for which a state forum can supply a remedy." Pet. App. 5a. Thus, under the Seventh Circuit's view, the federal courts' role under section 252(e)(6) is simply to ask whether the commission's presumptively correct interpretation results in an agreement that violates federal law.

The Seventh Circuit's reading of the Act's judicial review provision leads to an implausible outcome and reduces federal jurisdiction to the vanishing point. As explained above, negotiated agreements, like those at issue here, need not comply with the Act's substantive requirements at all. Under the Seventh Circuit's decision, an aggrieved party may go to federal court to complain that a state commission's determination interpreting a negotiated term of a previously approved agreement is inconsistent with the 1996 Act. But the federal courts must *always* reject that claim because negotiated agreements are *always* consistent with the requirements of the Act. In short, the dispositive question, as framed by the Seventh Circuit, must yield the same result in *every* case involving a negotiated term of a section 252

agreement. The only "real" claim in such a case — whether the state commission's action nullified the terms of the parties' section 252 agreement, and thus imposed new obligations in violation of section 252(a) — would have to be heard in state court. Congress could not have intended such a fragmentary and pointless division of jurisdiction.[9]

## II. PETITIONERS' VOLUNTARY ACCEPTANCE OF CONGRESS'S OFFER TO PARTICIPATE IN THE ACT'S REGULATORY PROGRAM WAIVED THE STATE'S ELEVENTH AMENDMENT IMMUNITY.

In *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-676 (1999), this Court reaffirmed the long established principle that a state may waive its Eleventh Amendment immunity by consenting to suit in federal court. See also *Alden* v. *Maine*, 527 U.S. 706, 755 (1999) (noting that Congress does not "lack the authority or means to seek the States' voluntary consent to private suits"); accord *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997). *College Savings* also confirmed that a state can manifest its consent to suit by accepting the benefits of a federal program that Congress clearly has conditioned on waiver of immunity, provided that (i) the benefit could only be given by Congress, (ii) Congress is free to grant or withhold it, and (iii) the state is free to accept or reject it. 527 U.S. at 676, 678 n.2, 686-687. At the same time, the Court made clear that a state does not waive its Eleventh

[9] The ultimate purpose of the "constitutional doubt" rule, invoked by petitioners (at 27-28), is to effectuate Congressional intent. The rule "has no application in the absence of statutory ambiguity." *United States* v. *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. 1711, 1719 (2001). Accordingly, where, as here, "Congress has made its intent clear" through legislative text, structure, and purpose, the courts "'must give effect to that intent.'" *Miller* v. *French*, 530 U.S. 327, 336 (2000) (quoting *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962)).



Amendment immunity simply by engaging in "otherwise permissible activity" that happens to be subject to federal regulation. *Id.* at 687.

Petitioners present two arguments in support of their contention that, notwithstanding their resolution of the parties' dispute under section 252, they did not consent to be made parties to a lawsuit seeking "[r]eview of State commission actions" under section 252(e)(6). First, petitioners contend that Congress did not request and the state did not grant with sufficient clarity either the *quid* or the *quo* necessary to effectuate a waiver. Second, petitioners assert that because the 1996 Act excludes nonconsenting states from the "otherwise permissible activity" of regulating local telephone service, it offers a "one-sided" choice that is so inherently coercive as to foreclose altogether any notion of a voluntary waiver. Neither argument has merit.

**A. Petitioners have knowingly and voluntarily consented to federal jurisdiction.** *College Savings*, *Alden*, and *Coeur d'Alene Tribe* all confirm that Congress may offer, and a state may accept, a deal that results in the state's relinquishment of its Eleventh Amendment immunity. However, in determining whether a state has waived its immunity "in the context of a particular federal program" (*Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 n.1 (1985)), this Court has required "that Congress speak with a clear voice" so that states may "exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). The 1996 Act plainly satisfies this test.

1. As the Seventh Circuit explained, the 1996 Act plainly and properly solicits a waiver of sovereign immunity. The Act sets forth parallel structures pursuant to which an administrative body exercises regulatory authority over interconnection arrangements, subject to review in federal

court. 47 U.S.C. § 252. If that regulatory responsibility is undertaken by the FCC pursuant to 47 U.S.C. § 252(e)(5), the FCC defends its actions in the federal courts of appeals as provided in the Hobbs Act, 28 U.S.C. § 2342. If a state public utility commission accepts Congress's offer to act as a deputized federal regulator under the Act, the commission does so with full knowledge that the Act permits aggrieved parties to seek review of state commission "determinations under [section 252]" in federal district court under 47 U.S.C. § 252(e)(6). Whether state or federal regulators perform the duties set forth in section 252, the Act expressly provides that a federal court will review those regulatory determinations. Thus, Congress made it "unmistakably clear in the language of the statute" (*Atascadero*, 473 U.S. at 242) that any state commission that elects to participate in the federal regulatory scheme by making determinations under section 252 consents to review of its actions in federal court for compliance with federal law. See *Dellmuth* v. *Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (joining Court's opinion with the understanding that clear statement rule does not preclude elimination of Eleventh Amendment immunity through "statutory text that clearly subjects States to suit * * * though without explicit reference to state sovereign immunity or the Eleventh Amendment").[10]

Petitioners' accusation that the Seventh Circuit improperly ignored the statutory text in finding the requisite statement of intent is inexplicable. The Seventh Circuit looked to *all* of the relevant language of section 252(e) before concluding that the state could have had no reasonable misapprehension as to the

[10] Petitioners' contention that Congress did not make sufficiently clear that the determination made in this case would be reviewable in federal court is belied by petitioners' own acknowledgment that they acted "under" section 252 of the Act in exercising authority "to interpret and enforce the terms of [the Agreements]." J.A. 112a; see also *id.* at 121a.



consequences of its participation in the Act's federal regulatory scheme.[11]

2. Petitioners also suggest that their *conduct* in voluntarily participating in proceedings under section 252 is not a sufficient manifestation of consent to suit in federal court. This is incorrect. Whether a state has waived its Eleventh Amendment immunity is a question of federal law. See *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278-279 (1959). This Court's decisions establish that a state can manifest its consent by accepting a Congressionally extended benefit. For example, Congress may, "in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that *acceptance of the funds entails an agreement to the actions*." *College Savings*, 527 U.S. at 686 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (emphasis added)).

Justice Kennedy's concurring opinion in *Wisconsin Department of Corrections* v. *Schacht*, 524 U.S. 381, 393 (1998), describes other circumstances in which a state's conduct may give rise to a waiver. In *Schacht*, Justice Kennedy discussed whether Wisconsin waived its immunity by consenting to removal of a case from state court — despite being under no compulsion to do so. *Id.* at 393-398 (Kennedy,

[11] Even though the "clear statement" test is satisfied here, there is no need to apply it in this context. The reason for requiring a clear statement is to determine with confidence that the quid pro quo includes an infringement of the state's sovereign interests. *Dellmuth*, 491 U.S. at 231. Here, there is no such infringement. Congress has created a scheme of "cooperative federalism" in which states may choose to regulate private activity under new rules set by Congress. Far from intruding on the states' turf, Congress has invited the states to enter the FCC's turf. If the state opts to act as a deputized federal regulator, it must agree to be treated like one for purposes of judicial review.

J., concurring). In answering this question in the affirmative, Justice Kennedy explained:

> [T]he absence of specific authorization, it seems to me, is not an insuperable obstacle to adopting a rule of waiver in every case where the State, through its attorneys, consents to removal from the state court to the federal court. If the States know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal.

*Id.* at 397 (Kennedy, J., concurring).

Under *Petty*, *Dole*, and *College Savings*, and consistent with Justice Kennedy's concurrence in *Schacht*, when Congress invites states to voluntarily participate as deputy federal regulators, it may define what action by the state constitutes waiver. As explained above, in section 252(e)(6) of the Act Congress unmistakably offered the states an opportunity to act as deputized federal regulators in exchange for the states' consent to have their actions reviewed in the federal courts. Congress also made it clear that state regulators are free to decline the offer, in which case federal regulators will stand in the shoes of their state counterparts and their decisions will be subject to federal review. By voluntarily wielding federal regulatory power under section 252 of the Act, petitioners knew that their actions would "bind [Illinois] to the jurisdiction of the federal court." *Schacht*, 524 U.S. at 397 (Kennedy, J., concurring). There can be no doubt about this. Petitioners expressly invoked section 252 of the Act when they made the determination at issue, and cited judicial authority stating that their interpretive ruling would be subject to federal court review. See pp. 17-18 & n.6, *supra*.



**B. Petitioners were free to decline to participate in the federal program.** Petitioners contend that they did not voluntarily waive the state's Eleventh Amendment immunity because the 1996 Act compels the state's "consent" to suit in federal court as the price for continued participation in the "otherwise permissible activity" of regulating local telephone service. That argument misapprehends both this Court's decision in *College Savings* and the 1996 Act.

1. In *College Savings*, this Court held that there is a distinction between an invitation to waive immunity on the basis of a state's voluntary acceptance of a federal gratuity (which is permissible) and compulsion to waive immunity as a "sanction" for a state's participation in "otherwise permissible activity" (which is unconstitutional). The Court therefore overruled its decision in *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), which had held that a state waives its Eleventh Amendment immunity simply by engaging in commercial activity that is subject to federal regulation. Because the statute at issue in *College Savings* subjected the states to suits for damages in federal court under the Lanham Act on the basis of the state's marketing of investment products — an "otherwise permissible activity" — the Court held that the state had not voluntarily waived its immunity. *College Savings*, 527 U.S. at 687, 691.

However, this Court in *College Savings* also reaffirmed its earlier holdings in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987). These cases together establish that Congress is free to condition a grant of money or regulatory authority that a state would not otherwise possess on the state's consent to suit in federal court. As the Court explained, conditions attached to a grant of federal authority (as in *Petty*) or receipt of federal funds (as in *Dole*) "are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity." *College*

*Savings*, 527 U.S. at 678 n.2. For example, the condition attached by Congress as the price for its approval of the interstate compact in *Petty* gave rise to a valid waiver upon acceptance of the condition by the state because "States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *Id.* at 686. See also *Innes* v. *Kansas State Univ.*, 184 F.3d 1275, 1281, 1284 (10th Cir. 1999) (holding in a post-*College Savings* case that the state "knowingly and voluntarily waived its Eleventh Amendment immunity" because the state agency "consent[ed] to participate in a federal program and to follow the conditions thereof, including participation in certain federal bankruptcy functions"), cert. denied, 529 U.S. 1037 (2000). *College Savings* thus confirms that Congress may, consistent with the Eleventh Amendment, allow states to exercise authority under a federal program on the condition that the exercise of that authority will be subject to federal review.

2. The fundamental error in petitioners' waiver argument is their failure to recognize that the waiver solicited by Congress under the Act falls on the *Petty* and *Dole* side of the line, not on the *Parden* and *College Savings* side.

There is no question that Congress has plenary authority under the Commerce Clause to enact legislation regulating local telephone competition. See *FERC* v. *Mississippi*, 456 U.S. 742, 764 (1982) ("the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities"). Congress exercised its authority under the Commerce Clause to enact a comprehensive federal statute governing aspects of local telecommunication competition. As this Court has noted, "[w]ith regard to the matters addressed by the 1996 Act," Congress "has taken the regulation of local telecommunications competition away from the States."



*AT&T Corp.*, 525 U.S. at 379 n.6.[12] Accordingly, the states have no *right* to participate in the regulation of those subjects under the new federal scheme. Congress, in its sole discretion, could have decided that the federal statute would be implemented exclusively by federal regulators.

State participation in implementing the 1996 Act simply cannot be characterized as an "otherwise permissible activity." State regulation under the 1996 Act is a wholly new regulatory activity, established by Congress to impose new obligations on incumbent LECs that foster a pro-competitive, de-regulatory national policy. It is only through the 1996 Act that potential new entrants gain the right to request interconnection under new, highly favorable terms, 47 U.S.C. § 251(c), and it is only through the Act that implementing agreements are formed which a state commission may, if it so chooses, arbitrate, modify, approve, reject, interpret, or enforce. It is solely within Congress's purview to determine whether and to what extent state regulators should be involved in the administration of the Act's regulatory program. Participating in the administration of a federal regulatory

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[12] Petitioners suggest (at 36) that "[t]he Act itself belies" this Court's conclusion that Congress has broadly preempted state regulatory authority. Petitioners first invoke a savings clause, section 601(c) of the Act, which purportedly preserves preexisting federal and state law absent explicit preemption. But the 1996 Act expressly displaces state law and this Court consistently has warned against "plac[ing] more weight on the saving clauses than those provisions can bear, either from a textual standpoint or from a consideration of the whole federal regulatory scheme." *United States* v. *Locke*, 529 U.S. 89, 105 (2000); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869, 870 (2000). Petitioners also observe that 47 U.S.C. § 152 assigns regulatory jurisdiction over local telecommunications to the states. But in *AT&T Corp.*, this Court held that the 1996 Act broadly reassigned regulatory authority over a wide range of subjects relating to local telecommunications to the federal government. 525 U.S. at 379 n.6, 382 n.8.

program as a deputized federal regulator is something that states cannot do "without first obtaining the express consent of Congress," and therefore "the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

Here, of course, Congress has chosen to offer the states a key role in the administration of the "new *federal* regime." *AT&T Corp.*, 525 U.S. at 379 n.6 (emphasis in original). The Act does not, however, compel a state commission to implement the Act's provisions. The states clearly retain the right to decline Congress's invitation. 47 U.S.C. § 252(e)(5). If a state declines Congress's invitation, the Act merely provides that the FCC will play the federal regulatory role, applying the same federal standards, again subject to federal judicial review. *Ibid.*

The 1996 Act presents states and their officials with the same sort of choice that this Court approved in *Petty* and *Dole* and again endorsed in *College Savings*. The opportunity to participate *as a regulator* in the implementation of a federal statute — a function that could not antedate the 1996 Act and which Congress could have reserved exclusively to the FCC — is a far cry from engaging *as a regulated entity* in an "otherwise permissible activity." When a state operates a savings plan or runs a railroad, that activity does not implicate unique federal interests. By contrast, when a state acts as a deputized federal regulator, Congress has a special interest in ensuring that the state officials' actions conform to uniform federal standards. The assertion of federal jurisdiction here does not expose the state to any monetary liabilities or interfere with its own internal government operations, but simply provides for federal court review of federal issues arising between private parties in the administration of a



federal program to ensure compliance with federal law. This is not a substantial burden or intrusion.[13]

In short, the Seventh Circuit's decision does not conflict with this Court's decision in *College Savings*. Rather, it follows inexorably from this Court's reaffirmation of *Petty* and *Dole*.

## III. PETITIONERS ARE PROPER PARTIES TO THIS LAWSUIT UNDER THE *EX PARTE YOUNG* DOCTRINE.

If this Court concludes that petitioners' voluntary participation in the Act's regulatory program waived the state's Eleventh Amendment immunity, there is no need to reach the final question on which the Court granted certiorari. Should the Court decline to find waiver, however, Ameritech's suit against petitioners may proceed under the *Ex parte Young* doctrine.

**A. This Court's decisions confirm that *Ex parte Young* applies here.** Under *Ex parte Young* and its progeny, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern* v. *Jordan*, 440 U.S. 332,

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[13] Whether *state* law made Congress's invitation to perform federal regulatory functions an offer that petitioners could not refuse has no bearing on this Court's Eleventh Amendment analysis. Because Congress has made clear that a state commission's determinations under section 252 are subject to review in federal court, the Illinois statutes requiring the state commission to make such determinations are properly viewed as express legislative waivers of Eleventh Amendment immunity. In view of the fact that petitioners' participation in the federal regulatory scheme is *optional* under federal law and *mandatory* under state law, petitioners' claim (at 38) that their "presence in federal court resulted not from a choice made and expressed by the State of Illinois, but from the unilateral action of Congress" has it exactly backwards.

337 (1979). As this Court has observed, the doctrine is grounded in the Supremacy Clause and "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). In *Ex parte Young* itself, the Court held that a state official whose conduct violates federal law may not be said to represent the state, and thus is stripped of immunity, because the state is bound to follow federal law under the Supremacy Clause. 209 U.S. 123, 159-160 (1908). The doctrine thus permits federal courts to issue declaratory or injunctive relief "to end a continuing violation of federal law" by state officials and "to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

This Court permitted actions to enjoin state officials acting in violation of federal law long before *Ex parte Young*. See *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304-305 & n.14 (1952) (noting that the Court had "long held," prior to 1908, that injunctive actions against state officers could proceed consistent with the Eleventh Amendment and that *Ex parte Young* merely "reexamined and reaffirmed" that principle); *Ex parte Young*, 209 U.S. at 167 (noting that "jurisdiction of this general character has * * * been exercised by Federal courts from the time of *Osborn* v. *Bank of United States*," a case decided in 1824). Federal courts have repeatedly reviewed the actions of state public utility commissions pursuant to the rule of *Ex parte Young*. See, *e.g.*, *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 344 n.4 (1951); *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941); *Bacon* v. *Rutland R.R. Co.*, 232 U.S. 134 (1914); *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908). Indeed, this Court has previously entertained a suit against members of the Illinois Commerce Commission seeking to



enjoin a quasi-judicial order entered by the Commission. *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300 (1937).

This Court's recent decisions reaffirm the vitality of the *Young* doctrine. In *Alden* v. *Maine*, for example, this Court reiterated that "suits for declaratory or injunctive relief against state officers must * * * be permitted if [federal law] is to remain the supreme law of the land," and thus the *Ex parte Young* doctrine is an "essential * * * part of our sovereign immunity doctrine." 527 U.S. 706, 747-748 (1999); see also *id.* at 757.[14] To determine whether jurisdiction is available under *Ex parte Young*, federal courts need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment); see also *id.* at 298-299 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (endorsing the same two-part test). Ameritech's claims easily meet this test,

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[14] Two Terms earlier, all nine Justices of this Court reaffirmed "the continuing validity of the *Ex parte Young* doctrine." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997); see also *id.* at 281 ("An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke [*Ex parte Young*]"); *id.* at 293 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment) ("When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar"); *id.* at 297 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) ("in the absence of some congressional limitation a federal court may entertain an individual's suit to enjoin a state officer from official action that violates federal law"). As Justice O'Connor stated, the *Ex parte Young* doctrine remains a "basic principle of federal law" that reflects "the importance of having federal courts open to enforce and interpret federal rights." *Id.* at 293 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment).

because Ameritech (i) alleges that petitioners violated federal law by imposing onerous interconnection obligations on Ameritech that clash with the terms of Ameritech's binding section 252 interconnection agreements and (ii) seeks equitable relief from those allegedly unlawful obligations. See J.A. 125a-146a.

**B. *Larson* and *Seminole Tribe* are irrelevant here.** Petitioners concede each of the following points: (i) "the Eleventh Amendment is generally not a bar to actions by private citizens in federal court to restrain state officials from committing ongoing violations of federal law" (Pet. Br. 41), (ii) the "continued vitality" of the *Ex parte Young* doctrine "is not in doubt" (*ibid.*), and (iii) *Ex parte Young* "applies if a state officer is alleged to be committing an ongoing violation of federal law" (*id.* at 42). Yet petitioners insist that this case falls outside the "generally" applicable *Ex parte Young* paradigm for two reasons. First, petitioners contend that under *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), they "cannot be said to violate federal law by resolving disputes within their lawful jurisdiction" (Pet. Br. 45), even if in so doing they commit "errors of federal law" (*id.* at 44). Second, relying on *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), petitioners assert that Congress "provid[ed] a specific mechanism for judicial review of state commission decisions rendered under the Act," and thereby "signaled its intent not to subject individual commission members" to the remedies available under *Ex parte Young*. Pet. Br. 41. Neither argument has merit.

1. Petitioners' reliance on *Larson* is misplaced. In *Larson*, the complaint alleged generally that a federal official was acting "illegally" and that his conduct was "unauthorized" (337 U.S. at 691), but there was no specific allegation "of any statutory limitation on his powers" (*id.* at 703), nor was there a claim that he was "acting unconstitutionally or pursuant to an unconstitutional grant of



power." *Id.* at 691. See also *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 693 (1982) (explaining that, in *Larson*, the federal officer's actions had been undertaken "pursuant to legitimate contractual authority," were "neither ultra vires nor unconstitutional," and "constituted at most a tortious deprivation of property").

In determining whether federal sovereign immunity applied, the *Larson* Court distinguished cases involving an alleged violation of federal statutory or constitutional law from those, like *Larson* itself, in which the sole claims involved alleged breaches of common law. The Court emphasized that "[u]nder our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions." *Larson*, 337 U.S. at 704. Thus, "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Id.* at 689. If the actions of a government official do not conflict with the official's statutory or constitutional authority, however, "then they are the actions of the sovereign, whether or not they are tortious under general law." *Id.* at 695. As this Court later summarized, *Larson* ruled that the plaintiff's suit failed because "the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers." *Malone* v. *Bowdoin*, 369 U.S. 643, 647 (1962).

Here, unlike *Larson*, Ameritech has clearly alleged that petitioners have breached a duty to comply with the substantive and procedural requirements imposed by federal law. *Alden*, 527 U.S. at 755 ("The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design"). Once petitioners opted to participate in the review of interconnection agreements under section 252 of the 1996

Act, they were duty bound under the Supremacy Clause to ensure that their actions comported with federal law. In particular, petitioners' task was to ensure that the terms of the parties' Agreements "me[t] the requirements of" the Act — including the requirement that the Agreements have "binding" effect (47 U.S.C. § 252(a)(1)) and that the parties' relationship be conducted "in accordance with the terms and conditions of" the Agreements (*id.* § 251(c)(2)(D), (c)(3)). Under *Ex parte Young* and its progeny, action in violation of valid federal law lies beyond the scope of any official authority, and a suit alleging that a state officer has taken such action thus is deemed to be against the officer as an individual, not against the state, for Eleventh Amendment purposes.[15]

In other words, under the Supremacy Clause, petitioners have no "discretion" to violate federal law when discharging their duties under the Act. *Ex parte Young*, 209 U.S. at 159-160; see *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974) (explaining that since *Ex parte Young*, "it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law"). Indeed, in *Ex parte Young* itself, this Court rejected the very argument advanced by petitioners here — namely, that a suit seeking to enjoin a state official from taking action that was alleged to violate federal law was barred by the Eleventh Amendment

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[15] Although *Ex parte Young* itself involved an alleged violation of the Constitution, this Court has consistently applied the rule to conduct that violates federal statutory and regulatory law as well. See, *e.g.*, *Coeur d'Alene Tribe*, 521 U.S. at 288 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment) ("if a state official violates federal law, he is stripped of his official or representative character"); *id.* at 300 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) ("Later cases have made it clear that a state official's act is also ultra vires for purposes of the *Young* doctrine when it violates other valid federal law").



because it would interfere with the officer's discretionary official duties. 209 U.S. at 144, 159.

Applying these well settled principles to the circumstances of this case, it is readily apparent that petitioners' reliance on the concept of discretion is misplaced. As this Court has noted, in allowing "the state commissions' participation in the administration of the new *federal* regime," Congress has not "allowed [the commissions] to do their own thing." *AT&T Corp.*, 525 U.S. at 379 n.6 (emphasis in original). To the contrary, "if the federal courts believe a state commission is not regulating in accordance with federal policy," there is "no doubt" that the courts "may bring it to heel" by "draw[ing] the lines to which [it] must hew." *Ibid.* As noted above, Ameritech claims that petitioners here failed to "regulat[e] in accordance with federal policy." In particular, Ameritech claims that petitioners violated federal law by imposing interconnection obligations on Ameritech that clash with the terms of Ameritech's binding section 252 interconnection agreements. Under *Ex parte Young*, these allegations of ongoing violations of federal law by state officials, sued in their official capacities for prospective injunctive relief, more than suffice to overcome any Eleventh Amendment bar to suit.[16]

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[16] Petitioners' reliance (at 43, 44) on *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984), also is misplaced. The issue in *Pennhurst* was whether a "claim that petitioners violated *state law* in carrying out their official duties * * * is one against the State and therefore barred by the Eleventh Amendment." *Id.* at 103 (emphasis added). The Court reiterated that "an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State." *Id.* at 113. At the same time, however, the Court emphasized that *Ex parte Young* "permitt[ed] suits alleging conduct contrary to 'the supreme authority of the United States.'" *Id.* at 102. *Pennhurst* therefore is fully consistent with *Larson*'s teaching that where an officer's actions are limited by federal statute (or by the Constitution), actions beyond those

2. Petitioners also perceive a conflict between the Seventh Circuit's decision and this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). As demonstrated below, the detailed remedial scheme that strictly limits the methods of judicial redress under the Indian Gaming Regulatory Act ("IGRA") in ways that are inconsistent with the remedies available under *Ex parte Young* simply has no analog under the Telecommunications Act of 1996. Unlike the IGRA, the 1996 Act places no limitations at all on the remedies that a federal court may fashion in a section 252(e)(6) suit to ensure that the obligations imposed on incumbent LECs through interconnection agreements comport with the Act. *Ex parte Young* and the Act's judicial review provisions work together to effectuate Congress's intent in the 1996 Act that state officials exercising federal regulatory power under the Act adhere to federal law. See *AT&T Corp.*, 525 U.S. at 379 n.6.

As this Court observed in *Seminole Tribe*, 517 U.S. at 73-74, the IGRA imposes a duty on states to negotiate in good faith with Indian tribes concerning gambling on reservations, 25 U.S.C. § 2710(d)(3)(A), "in conjunction with" a very "carefully crafted and intricate remedial scheme" for limited enforcement of that duty, *id.* § 2710(d)(7). For example, although the IGRA authorizes a federal court to order a state to negotiate in good faith, 25 U.S.C. § 2710(d)(7)(B)(iii), the IGRA does not permit the court to enforce its own order with contempt sanctions as it may do in normal circumstances. If a state flouts the court's order to negotiate, the court may do nothing more than refer the matter to a mediator. *Id.* § 2710(d)(7)(B)(iv); see *Seminole Tribe*, 517 U.S. at 74. Most important, under the IGRA a state cannot be subjected to judicial sanctions, such as contempt, even if it refuses to honor the compact selected by the mediator. In that event, "the only sanction * * * is that the mediator shall notify the

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limitations are considered individual and not sovereign actions. *Larson*, 337 U.S. at 689-695.



Secretary of the Interior who then must prescribe regulations" governing gaming on the tribal lands at issue. *Id.* at 74-75.

The Court in *Seminole Tribe* reaffirmed the vitality and importance of the *Ex parte Young* doctrine in "ensuring the States' compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14. As the Court explained, "an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Id.* And the Court stressed that *Ex parte Young* may be used to enforce state compliance with federal law *except* in the rare case in which (i) Congress has *specifically limited* the judicial remedies available against a state or its officials *and* (ii) those statutory limitations are *inconsistent* with the judicial remedies available against state officials under *Ex parte Young*. *Id.* at 71-72 & nn.14, 16. Applying this standard to the IGRA, the Court concluded that by confining the available remedies to a "quite modest set of sanctions," Congress had "strongly indicate[d] that [it] had no wish to" permit the judicial remedies against state officials that would be available under *Ex parte Young*. *Id.* at 75-76.

Allowing a party to use the federal courts to coerce a state into compliance with the IGRA through an injunction under *Ex parte Young*, backed by the threat of contempt, would have completely undermined the non-coercive remedial scheme established by Congress. But where, as here, Congress has *not* limited the available avenues of judicial redress, *Ex parte Young* continues to apply. *E.g.*, *Ellis* v. *University of Kansas Med. Ctr.*, 163 F.3d 1186, 1198 (10th Cir. 1998) (allowing suit under *Ex parte Young* because 42 U.S.C. § 1981 contains "nothing that indicates a 'detailed remedial scheme' designed to limit or prevent potential remedies within the *Seminole Tribe* meaning"); *Marie O.* v. *Edgar*, 131 F.3d 610, 616 (7th Cir. 1997) (same).

There is no tension, let alone inconsistency, between an *Ex parte Young* remedy and the Congressionally prescribed remedy under the judicial review provision in the 1996 Act. Unlike the situation in *Seminole Tribe*, permitting section 252(e)(6) suits to proceed under *Ex parte Young* would not "cast[] aside * * * limitations" that Congress intentionally crafted through "a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe*, 517 U.S. at 74. Contrary to petitioners' contentions, there are *no* limitations in section 252(e)(6) on the remedies that a federal court may invoke. Section 252(e) simply instructs the federal court to review the state regulators' actions for compliance with the 1996 Act and, if those actions deviate from the Act, the court may fashion any appropriate relief needed to ensure that the officials "hew" to "the lines" drawn by the Act. *AT&T Corp.*, 525 U.S. at 379 n.6.

Finally, the 1996 Act also differs from the IGRA with respect to who may be sued. In *Seminole Tribe*, this Court looked to the statutory language in concluding that the IGRA did not contemplate "both a suit against a State * * * and a suit against a state official." 517 U.S. at 75 n.17. As the Court noted, the IGRA refers repeatedly to "the State." *Ibid.* And "the duty imposed by the Act — to 'negotiate * * * in good faith to enter into' a compact with another sovereign — stands distinct in that it is not of the sort likely to be performed by an individual state executive officer or even a group of officers." *Ibid.* Neither circumstance is present here. First, the definition of "State commission" in the Act reveals that Congress did not intend to refer to the sovereign, but instead to the group of officials exercising delegated power within the state government: "The term 'State commission' means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C.



§ 153(41). Second, the state commission determinations that are reviewable under section 252(e)(6) are always performed by "an individual state executive officer or * * * a group of officers." *Seminole Tribe*, 517 U.S. at 75 n.17.

In actions for judicial review of an agency determination, it is standard procedure for the agency or its officials to appear in federal court to defend its decision. See, *e.g.*, 5 U.S.C. § 702; Fed. R. App. P. 15. Such suits are so frequent that Fed. R. App. P. 43 provides for automatic substitution of successor officers when officials leave office. And, as noted above (see p. 40, *supra*), lawsuits against state officials challenging the collective decisions of state agencies have been commonplace for nearly a century under *Ex parte Young*. When Congress provided for "[r]eview of State commission actions" in section 252(e)(6), it was legislating against the background rule that agencies or agency officials are usually parties to the judicial review of their orders. In short, Congress must be presumed to have known that the *Ex parte Young* doctrine enables the federal courts to "bring * * * to heel" recalcitrant state officials who refuse to "hew" to "the lines" drawn by the Act and its implementing regulations. *AT&T Corp.*, 525 U.S. at 379 n.6.

It would be difficult to conceive of a tighter fit between the remedy contemplated in the Act (a federal court order requiring that the agreement conform to the standards of the federal Act) and *Ex parte Young*'s core function of permitting "suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *Ex parte Young*). Review under *Ex parte Young* in no way expands the scope of judicial review or the remedies available under the Act. Unlike the IGRA, the Act does not prohibit courts from ordering appropriate equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies"

under a federal statute. *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).

As one federal court recently noted, "the remedy provided for by statute [under the Act] and the remedy under *Young* are one and the same." *Bell Atlantic-Delaware, Inc.* v. *Global NAPs South, Inc.*, 77 F. Supp. 2d 492, 501 (D. Del. 1999). Petitioners' effort to use *Seminole Tribe* to circumvent the federal review that Congress deemed necessary would effectively turn that decision's reasoning on its head and subvert the federalism and supremacy purposes that *Ex parte Young* has fostered for nearly a century.

## CONCLUSION

The decision of the Seventh Circuit should be affirmed in part and reversed in part and the case remanded with instructions to the courts below to adjudicate Ameritech's claims on the merits.

Respectfully submitted.

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